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**CURRENT TOPICS.**

The Supreme Court of Pennsylvania, in *Haskell v. Jones*, 5 W. N. 165, hold that the statute of that state requiring all negotiable instruments given for patent rights to show on their face that they were so given; making such notes in the hands of any purchaser or holder subject to the same defenses as if in the hands of the original owner, and rendering all persons taking negotiable instruments, knowing their consideration to be the sale of a patent right, which have not the words "given for a patent right" written or printed on their face, liable to prosecution for a misdemeanor, is constitutional, and not in conflict with art. 1, sec. 8, of the Constitution of the United States. The court also hold that the negotiability of a note, in which the required words are not inserted, is in no way affected by the act, but that the innocent holder who takes it before maturity for value, without knowledge or notice of the consideration, takes it, as heretofore, clear of all equities between the original parties. The first point decided by the court is in conflict with the decisions of other courts, in which similar statutes have been declared unconstitutional. See *Cranson v. Smith*, 5 Cent. L. J. 387; *Woolen v. Banker*, 6 Am. L. Rec. 236; *State v. Peck*, 25 Ohio St. 29; 5 Cent. L. J. 377.

In the Supreme Court of the United States in a late case, *Union Pacific R. R. v. Stewart*, the Chief Justice referred in strong language to the records which come to that court from the circuits. "This," he said, after deciding the questions of law in the appeal, "disposes of the case, but we feel it our duty to call attention to the very unsatisfactory manner in which the record has been made up and sent here for the purposes of this appeal. It contains nearly twelve hundred printed pages, and is full of irrelevant matter and useless repetitions. All that is material for the proper presentation of the cause might easily have been put into one-fourth the space. It opens with a copy of the bill, occupying seventeen pages, and immediately following this is a certified

copy of the same bill attached to the return of the service of a subpoena upon one of the corporation defendants, as to which the suit was subsequently dismissed. The proposition made by Stewart on the 6th of January, 1866, and which is claimed to have been the basis of the contract sued upon, is copied no less than ten times, and an affidavit of his, which occupies seventeen pages, is copied three times within a space of seventy pages. These are but specimens of the gross irregularities with which the record abounds. In addition to this the matter is not well arranged and the index is almost useless. We have long suffered from the want of attention of parties or their counsel, and the incapacity, not to say dishonestly, of clerks below in matters of this kind, and deem this a proper occasion for applying the remedy for such neglect or abuse. We are at a loss to determine whether the complainant or defendant is most to blame for the irrelevant matter which has been introduced into this case, but it is clearly the duty of the party who takes an appeal to see to it that the record is properly presented here. Care should be taken that costs are not unnecessarily increased by incorporating useless papers, and that the case is presented fairly and intelligently. While, therefore, the decree in this case will be reversed, each party will be required to pay his own costs in this court. We shall not hesitate to apply the same remedy hereafter in cases where the circumstances are such as to require it."

In an action on a policy of insurance against loss by fire, where the defense is that the property was willfully burned by the insured, it is held by the Court of Errors and Appeals of New Jersey, in the late case of *Kane v. The Hibernia Ins. Co.*, 17 Alb. L. J. 226, that the rule in civil, and not in criminal cases, as to the *quantum* of proof applies. The doctrine that, in an action on a policy, the defense that the plaintiff had willfully set fire to the premises must be as fully and satisfactorily proved as if the plaintiff were on trial on indictment, originated in the case of *Thurtell v. Beaumont*, 8 J. B. Moore 612; 1 Bing. 339. This ruling is adopted by Mr. Greenleaf and Mr. Taylor, and is strongly approved by the latter writer, 2 Greenl. Ev., § 418; 1 Taylor's Ev. (5th ed.) 97, a. It is disap-

proved by Mr. Wharton, and is vigorously assailed by Mr. May, the author of *May on Insurance*, in an article in the *American Law Review*. 2 Whart. Ev., § 1246; 10 Am. Law Rev. 642. The decision on this point, in *Thurtell v. Beaumont*, was made on an application for a rule, and without much consideration. It has never received approval in the English courts, although, as a rule of evidence, occasions have repeatedly arisen for its adoption and application. The carriers act (11 Geo. IV & 1 Wm. IV, c 68) relieves a carrier from responsibility for the loss of or injury to goods in certain cases, unless the loss or injury arose from the felonious acts of its servants. In *G. W. Ry. Co. v. Pimell*, 18 C. B. 575; *Metcalfe v. L. & B. & S. C. R. R.*, 4 C. B. (N. S.) 307; *Vaughton v. L. & N. W. R. R. Co.*, L. R. 9 Exch. 93; *McQueen v. G. W. R. Co.*, L. R. 10 Q. B. 569, it was held that this issue was to be determined by the simple weight of evidence, as in other civil cases. In *Cooper v. Slade*, 6 E. & B. 447, 6 H. L. Cases, 746, the action was for a penalty under the bribery act. Parke, B., charged the jury that if they were satisfied, upon the evidence, that the defendant did, by himself or any other person on his behalf, promise money to the voter to induce him to vote, they should find for the plaintiff. This direction was held correct by the House of Lords. Under the bribery act, any person promising or giving money to a voter, to induce him to vote, was deemed guilty of a misdemeanor, besides rendering himself liable to a penalty.

"In the courts of this country," says Depue, J., who delivered the opinion in the principal case, "the principle adjudged in *Thurtell v. Beaumont* has received but slender support, except in libel and slander cases. The weight of authority is decidedly against the soundness of the rule there propounded, in its application to actions on policies of insurance, as well as other civil actions, where the issue is such that, for its support, a case must be made such as would afford ground for an indictment. In *Gordon v. Parmelee*, 15 Gray, 413, it was held that in an action on a promissory note, the defense that the note was obtained by false and fraudulent representations, might be sustained by a preponderance of evidence, as in other civil cases, and that it was not incumbent on the defendant to establish it

by proof beyond a reasonable doubt, although the defense was based on a charge of fraudulent representations such as might be the subject of a criminal prosecution. In *Bradish v. Bliss*, 35 Vt. 326, the action was in trespass for burning the plaintiff's building, and the evidence showed that the defendant, if guilty of trespass, had set fire to the building designedly, and was guilty of the crime of arson. The court, nevertheless, held that, it being a civil cause, the issue must be determined by the fair preponderance of evidence. A similar decision was made in *Munson v. Atwood*, 30 Conn. 102, which was an action on a statute which gave the right to recover the treble value of property feloniously taken. In *trover*, where the evidence was such as to involve a charge of larceny, a direction to the jury that the evidence, to justify a verdict against the defendant, must satisfy them of the truth of the charge beyond a reasonable doubt, was held to be erroneous. *Bissel v. West*, 35 Ind. 54." In an action on policies of insurance, *Thurtell v. Beaumont* has been repeatedly repudiated; see *Schmidt v. N. Y. U. M. Fire Ins. Co.*, 1 Gray 529; *Scott v. Home Ins. Co.*, 1 Dill C. C. 105; *Huchberger v. Merchants' Fire Ins. Co.*, 4 Bissell C. C. 265; *Washington Ins. Co. v. Wilson*, 7 Wis. 169; *Blaeser v. M. M. M. Ins. Co.*, 37 Wis. 31; *Rothschild v. Amer. Cent. Ins. Co.*, 62 Mo. 356; *Ætna Ins. Co. v. Johnson*, 11 Bush. 587; *Hoffman v. W. M. & F. Ins. Co.*, 1 La. Ann. 216; *Wightman v. Same*, 8 Rob. 442.

#### THE DEGREES OF MURDER. II.

Having arrived at this point of our investigation, it would seem the legal mind should have no trouble in determining what modes of killing constitute murder in the second degree. A definition which would cover all cases in advance might not be easily framed, but it would seem that a judicial investigator should have no trouble, with the facts of a particular case before the mind, in determining what kind of killing it is.

Any murder at common law, not declared by statute to be manslaughter, or justifiable or excusable homicide—not committed by means of poison, nor by lying in wait, nor by any other kind of willful, deliberate and premeditated killing, nor in the perpetration or attempt to perpetrate arson, rape, robbery, burglary,

or some other felony, is murder in the second degree under our statute. Our law-makers have drawn the line between the two degrees broad and deep; but the adjudications under the statute have been of such a character as to partially obliterate the line, so that the profession in the state is in doubt as to the kinds of killing which constitute murder in the second degree, and some even doubt whether there is anything on which the second section of the statute can act.

Before I proceed to point out some of the many classes of murders on which this statute can act, I will reiterate my position:

1. Murder is known to, and defined by, the common law, and is not defined by our statute.

2. The statute classifies murder, and divides it into two degrees, and declares what kinds of murder shall be deemed to be in each.

3. Malice is a necessary ingredient in murder in either degree.

4. Malice is a condition of the mind evidenced by the intentional doing of a wrongful act—not in “the heat of passion”—which might reasonably be expected to result in death or bodily harm to some human being.

5. The existence of malice is a fact to be inferred from proofs of the facts and circumstances connected with the killing.

6. All that class of malicious homicides known to the common law as such, which shall be committed by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, or in the perpetration or attempt to perpetrate arson, rape, robbery, burglary or other felony, are deemed murder in the first degree.

7. All that class of malicious homicides known to the common law as such, not committed as specified in the preceding paragraph, and not declared by statute to be manslaughter, or justifiable or excusable homicide, are deemed murder in the second degree.

With the facts and circumstances connected with a killing before me, I would first determine whether the homicide was justifiable or excusable under the statute; and, if not, I would next inquire whether the facts and circumstances were such as to justify the inference of malice; and if they were not, I should have no difficulty in determining in what degree of manslaughter the slayer is guilty. But if malice might fairly be inferred from the facts and circumstances before me, I would at

once decide the killing to be murder; and if committed by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, or in the perpetration or attempt to perpetrate arson, rape, robbery, burglary or other felony, I would have no trouble in assigning it to its proper kind under the statute, and should press for a conviction for murder in the first degree. But if not so committed, I should conclude that killing in that mode constituted murder in the second degree. Having pursued the subject to this point, the student of the common law in respect to homicide should have a clear conception of murder in the second degree under our statute; but it may be profitable to designate some of the many kinds or modes of killing which would be murder in the second degree in Missouri.

In the case of *The State v. Wieners, supra*, the learned judge asks: “What, then, is murder in the second degree?” and proceeds to answer the question as follows: “It is the unlawful killing of a human being, with malice aforethought, but without deliberation. It is where the intent to kill is, in the heat of passion, executed the instant it is conceived, or before there has been time for the passion to subside. We do not use the phrase ‘heat of passion’ in its technical sense, but as a condition of the mind contradistinguished from a cool state of the blood. Take the case of A and B, who had been on friendly terms, but they have an altercation in which A calls B a liar, and with a pistol or other deadly weapon B instantly, in a passion engendered by the insult, kills him. This, at common law, was murder; but lacking the element of deliberation, it is, under our statute, murder in the second degree. At common law, there were instances of provocations, not amounting to an assault upon the person, which extenuated the guilt of homicide, ‘or, to speak more properly, they serve to explain the act and rebut the presumption of malice—1 East. 235, where instances are given.’”

The paragraph quoted is variously subject to criticism. As a definition of murder in the second degree, the first sentence is defective. It is not enough, in order to class an unlawful killing of a human being with malice as murder in the second degree, that it be “without deliberation,” for it must not have been committed in the perpetration or attempt to perpetrate

arson, rape, robbery, burglary or other felony. The next sentence is: "It is where the intent to kill is, in a heat of passion, executed the instant it is conceived, or before there has been time for the passion to subside." This sentence, as a general definition, is defective, for a killing, as stated in the sentence, without the use of a deadly weapon, would be manslaughter, and not murder under our statute. The illustration of the killing of A by B, under the circumstances named, literally furnishes a case of murder in the second degree. The concluding sentence of the paragraph above quoted is as follows: "At common law, there were instances of provocations, not amounting to an assault upon the person, which extenuated the guilt of homicide, 'or, to speak more properly, they serve to explain the act and rebut the presumption of malice.'" In this quotation from East, in support of his definition of murder in the second degree, the learned judge seems to have overlooked the fact that at the common law there is but one degree of murder, and that the circumstances which would "extenuate the guilt of homicide," or "serve to explain the act and rebut the presumption of malice," reduce the offense, not to a second degree of murder, but to manslaughter.

But to proceed to designate some of the killings which would constitute murder in the second degree in Missouri, the paragraph last quoted from Wieners' case, will furnish the thought for the first example. 1. The cases of killing with a dangerous or deadly weapon, being thereunto greatly provoked, but not by a lawful provocation, where the intention to kill is executed the instant it is conceived, or before there has been time for the passion to subside. 2. The case of willfully riding an unruly horse among a crowd of persons, the probable danger being great and apparent, and death ensues from the viciousness of the animal. 3. The case of the unnatural son who exposed his father to the air against his will, by reason whereof he died. 4. Of the harlot who laid her child under the leaves in an orchard, where a kite struck and killed it. 5. Of the workman who threw down a stone or piece of timber from a building into the street in a populous town, where people were continually passing, and killed a person. 6. Of the overseers of the poor who willfully neglected and refused to furnish food for a beggar in their charge, and he died. 7. Of a person who fired

a gun into a crowd of persons regardless of whom it hurt, and struck and killed a man. All these are cases of murder at the common law, recognized and mentioned in the books, and the imagination might supply many more. They are all malicious homicides as malice has herein been explained, and were not committed by means of poison, nor by lying in wait, nor by any other kind of willful, deliberate and premeditated killing, nor in the perpetration or attempt to perpetrate any felony, hence they are murders in the second degree.

The sum of the whole matter is, that, 1. If A, with deliberation and premeditation, and with the specific intent to kill, and with the means to kill in hand, strikes and kills B, the crime is malicious and is murder in the first degree. Or if he kills with malice in the perpetration or attempt to perpetrate arson, rape, robbery, burglary or any other felony, the crime is murder in the first degree, but, 2. If A, in hot blood engendered by a gross insult not amounting to an assault upon the person, or lawful provocation, with a deadly weapon, on the impulse and before there has been time for the passion to subside, willfully strikes and kills B, malice is not *presumptio juris*, to be arbitrarily applied by the judge, but may be fairly inferred from proof of the use of a dangerous weapon, and the crime is murder, but not in the first degree because the elements, deliberation and premeditation, are wanting. 3. If A, with a dangerous weapon and with the specific intent to do some great bodily harm to B, as to break his arm or leg, but not to kill, strikes or shoots and inflicts a mortal wound from which B dies within a year and a day, the crime is murder in the second degree, for the intent to do great bodily harm manifests "evil intent to hurt people," which is malice. 4. If A, regardless of the consequences, shoots into a crowd of people and kills a person, the crime is murder, for he intentionally puts into motion a dangerous agency, which may reasonably be expected to kill or do great bodily harm to some person. Hence the act is malicious, but lacking some of the ingredients of murder in the first, it is murder in the second degree. 5. If A, whose duty it is to feed and clothe B—a pauper—willfully neglects and refuses to furnish food, so that B dies, the crime is murder; but as the specific intent to kill is wanting, it is in the

second degree. 6. If A, knowing the unruly character of his horse, willfully rides into a crowd of people and a person is killed by the viciousness of the animal, the crime is murder, but lacking some of the essential ingredients of murder in the first, it is murder in the second degree. Many other instances might be given, but let these suffice to demonstrate that there is in Missouri a large class of malicious homicides, which are properly classed and should be punished as murders in the second degree. And my own experience and observation justify me in expressing the opinion that, in trials for murder in this state, there are many acquittals where there should be convictions for murder in the second degree, for juries often break through the leading strings of legal presumptions, with which the court surrounds them, and their common sense will revolt at the declaration from the bench that a moment is time enough for deliberation and premeditation; and when they are precluded by instruction from finding guilt in the second degree, they are driven to the alternative of an acquittal.

J. H. S.

(To be continued.)

#### LIBEL—PUBLICATION OF PROCEEDINGS BEFORE A MAGISTRATE.

##### USIL v. HALES ET AL.

*English High Court of Justice, Common Pleas Division—January 29, 1878.*

Where persons, in the course of an *ex parte* application to a magistrate, made certain statements highly defamatory of the plaintiff, and the magistrate, after hearing the facts, declined to grant a summons on the ground that he had no jurisdiction: *Held*, that this was a judicial proceeding, and that a fair and *bona fide* report thereof, published by the defendants in their newspapers, was privileged.

The plaintiff, a civil engineer, had employed three persons in the construction of a certain railway, and in consequence of a dispute which arose between them and the plaintiff as to the amount of wages due to them, they had applied to a metropolitan police magistrate for a summons under the Master and Workman's Act. In the course of the application certain statements were made which were highly defamatory of the plaintiff, and eventually the magistrate stated that he had no jurisdiction in the matter, and referred the applicants to the county court.

The actions were brought against the defendants, who were the printers and publishers of the *Daily News*, the *Standard* and the *Morning Advertiser* respectively, for libel in having published reports of the proceedings in the police court, in-

cluding the defamatory statements concerning the plaintiff.

The actions were tried together in the Michaelmas sittings, 1877, before Cockburn, C. J., when the jury found that the reports were fair reports of what occurred, and the learned judge thereupon ruled that they were privileged.

A rule having been subsequently obtained for a new trial,

*Sir H. S. Giffard, S.G., Bremner, Yelverton and Barnard* showed cause.—There is no difference between an application to a magistrate and applications to any other tribunal. It seems to be established that, although an application is dismissed by a magistrate on the ground that he has no jurisdiction, it is nevertheless privileged. This privilege has been denied on two grounds, viz. (1), where comments have been given, and (2), where the proceedings were not final; but neither of these exceptions applies to this case. *Duncan v. Thwaites*, 3 B. & C. 582, is distinguishable on the ground that in that case the matter was not finally disposed of; but, if not, it is submitted that it cannot be law after the decision in *Lewin v. Levy*, 6 W. R. 629. In addition to these cases they cited the following authorities:—*Curry v. Walter*, 1 B. & P. 525; *R. v. Wright*, 8 T. R. 297; *Wason v. Walter*, 17 W. R. 169, L. R. 4 Q. B. 87; *Ryalls v. Leader*, 14 W. R. 838, L. R. 1 Ex. 296; *Popham v. Pickburn*, 10 W. R. 324; *Bulkly v. Wood*, and *Lake v. King*, 1 Vin. Abr. 389.

*Ballantine, Serjt., and Shortt*, in support of the rule.—With regard to the privilege of counsel's statements, it has been decided that it only applies to counsel, and will not protect a publication of malicious statements by another person. There is no public advantage attendant upon the publication of such a proceeding as this, which is in no sense a judicial proceeding. Where the magistrate says, "I have no jurisdiction; you are in the wrong court," there can be no privilege. *Lewis v. Levy* went further than any other case in favor of privilege, but it was there only decided that, where both parties are heard, and a final decision given, the report is privileged. Here there was not only no termination of the case, but there was no beginning. No case has decided that a statement made behind the back of another person is privileged merely because it is made in a court of justice. And all the old cases, with the exception of *Curry v. Walter*, established that *ex parte* statements were not within the privilege. They referred to the following cases:—*Davison v. Duncan*, 5 W. R. 253, 7 E. & B. 231; *R. v. Brice*, 2 B. & A. 606; *R. v. Fisher*, 2 Camp. 571; *Hoare v. Silverlock*, 9 C. B. 23; *McGregor v. Thwaites*, 3 B. & C. 24; *Saunders v. Mills*, 6 Bing. 213; *Kane v. Mulvany*, Ir. R., 2 C. L. 402.

LORD COLERIDGE, C. J.:

I am of opinion that these rules should be discharged. The action was brought against certain newspapers for publishing a *bona fide* report of some proceedings before a magistrate. Three persons had been employed by the plaintiff in constructing a railway, and they applied to the magistrate for a summons against the plaintiff under

the Master and Workman's Act. If the facts, when stated, had been proved, the magistrate would have had jurisdiction, but, under the circumstances, he was of opinion that there was no ground for an order or summons. In one sense, therefore, it was an application over which he had no jurisdiction; but it is the nature of the application which is to be considered in determining the question of jurisdiction—*i.e.*, the question of jurisdiction to hear the facts. This is well explained in *Reg. v. Bolton*, 1 Q. B. 66, and *Brittain v. Kinaird*, 1 B. & B. 432. Therefore, I take it, the magistrate in the present case had jurisdiction to enter on the inquiry, and it was consequently a judicial proceeding. If so, then, *prima facie*, the matter complained of was a privileged publication, and it is now too late to inquire whether the rule extends to such a proceeding, for it has been frequently decided that it does so.

It was attempted to distinguish this case, and to bring it within an alleged qualification of the rule, by showing this to have been an *ex parte* proceeding before a magistrate. Sixty or seventy years ago this argument might have prevailed. From the cases cited in *Starkie on Libel* (4th ed. p. 167, *et seq.*) the rule seems to have been established that an *ex parte* proceeding was not privileged, on account of the hardship which would otherwise ensue to the party libeled, and this was adopted in *Duncan v. Thwaites*. But since that time the courts have come to conclusions irreconcilable with those cases. In *Wason v. Walter*, Lord Chief Justice Cockburn, in delivering judgment, said, "Whatever disadvantages attach to a system of unwritten law, and of these we are fully sensible, it has at least this advantage, that its elasticity enables those who administer it to adapt it to the varying conditions of society, and to the requirements and habits of the age in which we live, so as to avoid the inconsistencies and injustice which arise when the law is no longer in harmony with the wants and usages and interests of the generation to which it is immediately applied." To the principle involved in that passage I quite adhere. It is well known that the inquiries before coroners, which formerly were not privileged, are now daily reported, and that there is no valid objection to such reports if honest, *bona fide*, and made without intention to injure. If there had been a case directly in point where the jury had found that the matter was at an end, and it had been held that there was no privilege, I should have followed it. I am not quite satisfied as to the supreme advantage to the public of allowing these publications, or whether it ought to outweigh the injury to private individuals that may arise from them, but a judge must not fritter away a rule because he is not satisfied with it.

It seems to me that *Lewis v. Levy* is quite in point. There may be distinctions between the facts of that case and those of the present, but the *ratio decidendi* covers this case; for the decision was based on the ground that a judicial proceeding terminating in a refusal to set the criminal law in motion may be reported, and that such report, if fair and *bona fide*, will be privileged; and I cannot,

moreover, distinguish this case from *Curry v. Walter*, which was adopted by the Queen's Bench in *Lewis v. Levy*.

LOPES, J.

On principles of public convenience, the ordinary rule is that no action can be maintained in respect of a fair and impartial report of a judicial proceeding, though the report contain matter of a defamatory kind and injurious to individuals. It was urged that the matter in respect of which the application was made was not within the jurisdiction of the magistrate; but the cases are clear, and show that want of jurisdiction will not take away the privilege if it is maintainable on other grounds. Nor do I think the privilege is confined to the superior courts; it is not the tribunal, but the nature of the alleged judicial proceeding which must be looked at.

The point mainly relied on by the defendants was that the application to the magistrate was *ex parte*, and as such could not be privileged. Had the matter before the magistrate been in the nature of a preliminary inquiry, and if the ultimate judicial determination was to remain in abeyance until a further investigation, I should have thought there was authority, at any rate, for the plaintiff's contention, though how far the authorities might be followed in the present day I think doubtful; but the matter of the application was finally disposed of by the magistrate, and I can find no case where a fair report of a judicial proceeding finally dealing with the matter in open court has been held libelous. There are authorities which, until they are carefully examined, would seem to support the contention that an *ex parte* proceeding in court is not privileged. So far as I can ascertain, these are cases where the proceeding was preliminary, and where there was no final determination at the time of the alleged libelous report.

On the other hand, *Curry v. Walter* and *Lewis v. Levy* are strong authorities in favor of the report in this case being protected, and I therefore think the rule should be discharged.

Rule discharged.

#### "CIVIL DAMAGE" LAWS—INTOXICATING LIQUORS.

CALLOWAY v. LAYTON.

Supreme Court of Iowa—December Term, 1877.

HON. WM. H. SEEVERS, Chief Justice.

" JAMES G. DAY,  
" JAMES H. ROTHROCK, } Associate Justices.  
" JOSEPH M. BECK,  
" AUSTIN ADAMS,

1. INTOXICATING LIQUOR—ACTION BY WIFE FOR SALE TO HUSBAND.—Threats and vulgarity directed by the husband to the wife, unaccompanied by physical injury, will not entitle her to recover either actual or exemplary damages, under the Iowa statute authorizing the wife to recover for injury to her person, caused by the sale of intoxicating liquor to her husband.

2. THE WORDS "IN PERSON," as used in that statute, mean *in body*, and hence threatening language or vulgar conduct not resulting in the impairment of her

health, does not constitute a ground for the recovery of actual damages.

3. THERE CAN BE NO EXEMPLARY DAMAGES when there are no actual damages.

#### APPEAL from Des Moines District Court;

The plaintiff avers in her petition that she has been injured in her means of support and in her health by the intoxication of her husband, induced by liquor sold him by the defendant. The evidence tends to show that she has been injured in her means of support. As to injury to her health or person the evidence shows that the plaintiff's husband, when intoxicated, frequently threatened to kill her, but does not show that he ever attacked her, or inflicted any physical injury upon her.

The court allowed a witness to testify, against the objection of defendant, that the plaintiff's husband, when intoxicated, called the plaintiff a prostitute in the presence of her neighbors. On the subject of injury to the plaintiff's person, the court instructed the jury that they might consider any "threatening language or vulgar conduct by the husband toward her personally in contradistinction to his conduct toward and in presence of others." Judgment for plaintiff. Defendant appeals.

*Hall & Baldwin*, for appellant; *Poor & Mills-paugh, Dodge & Dodge*, and *Clark Marble*, for appellee.

#### ADAMS, J., delivered the opinion of the court:

It is obvious that physical injury may result indirectly from what effects directly only the mind. In this way threatening language and vulgar conduct by the husband toward the wife might, if long continued, result in the impairment of her health. Evidence of threatening language and vulgar conduct would be admissible in connection with any evidence tending to show that it had the effect to impair the plaintiff's health. In this case there is no evidence, so far as the abstract shows, that the plaintiff's health was impaired by any word or act of her husband. The instruction given by the court is based upon the idea that the plaintiff may be injured in person, within the meaning of the statute, without sustaining a physical injury; that an injury to the plaintiff's feelings merely, is an injury to the person where it results from language or conduct directed to her. The counsel for the appellee go still further and contend that the evidence was admissible, not only on the ground that there may be an injury to the person without physical injury, as the court held, but also upon the ground that mental suffering may be shown as a ground of exemplary damages. We have then the question whether threats and vulgarity, directed by the husband to the wife, unaccompanied by physical injury, will entitle her to recover actual damages, and if not, whether they will entitle her to recover exemplary damages.

In *Mulford v. Clewell*, 21 Ohio St. 196, which arose under a statute similar to ours, the court below, in instructing the jury upon the subject of injury to the plaintiff's person, said: "Mortification, and sorrow, and loss of her husband's society, are not enough. They are misfortunes for

which she has no remedy under this law. If she had been attacked by her drunken husband and injured in her person by his violence, she could recover." On appeal this instruction was approved. A similar statute in Illinois is construed in the same way. *Freese v. Tripp*, 70 Ill. 503.

In the case at bar, the court attempted to discriminate between the mental suffering experienced by the wife from language and conduct of the husband not directed towards her, and the suffering from language and conduct which were directed towards her.

The words "in person" are not understood by the court below to mean *in body*. An injury in person is understood to be synonymous with personal injury. Vulgar conduct of the husband in general, however mortifying and painful to her feelings, is thought by the court not to be a personal injury, but becomes so when it is directed to the person. We are of the opinion that the court misconceived the meaning of the words "in person." We think that they mean *in body*. That was evidently the view of the court in *Mulford v. Clewell*, above cited. The statute gives a right of action to any one who shall be injured in person. To hold that it was designed to give a right of action to every one to whom a threatening or vulgar remark should be addressed by an intoxicated person would, in our opinion, be putting a construction upon the statute of which it is not properly susceptible. If we are correct then, threatening language or vulgar conduct, although directed to the plaintiff, but not resulting in the impairment of her health, do not constitute a ground for the recovery of actual damages, and the court erred in instructing the jury that they might be considered in that connection.

Whether threatening language or vulgar conduct might be considered as a ground for exemplary damages, it is not strictly necessary to determine. The case must be remanded for error in the instruction, and possibly upon another trial such question might not arise. As counsel for plaintiff, however, insists that threatening language and vulgar conduct, even where they fall short of constituting a ground for actual damages, do constitute a ground for exemplary damages, it seems probable to us that upon another trial this question will be raised. In proceeding to determine it, we may observe, in the first place, that exemplary damages can not be recovered in any case where no actual damages have been sustained. This proposition, we presume, no one will attempt to deny. In this case no actual damages are recoverable, except for injury to plaintiff's means of support. To such actual damages can there be added exemplary damages for threatening language and vulgar conduct? We think not. There is no connection between the two. To actual damages for injury sustained by plaintiff in her means of support, there may be added exemplary damages, but they must be such as are called for by the circumstances under which the actual damages are sustained. Exemplary damages are given as punitive. They are given because the defendant was guilty of malice or wantonness. They are al-

lowed by statute in an action like the present, because whoever causes injury by the sale of intoxicating liquor, causes it wantonly. In no such case can the defendant be regarded as wholly without guilt. Exemplary damages, when given, are given with reference to the defendant's guilt, and should be in proportion to it. In adding exemplary damages to the actual damages sustained by the plaintiff in her means of support, if such were added, it was proper for the jury to consider defendant's guilt in causing such injury. If the defendant sold the plaintiff's husband liquor against the plaintiff's protest that would be an aggravating circumstance and would enhance the defendant's guilt. So, if the defendant knew that the plaintiff was being injured in her means of support, and continued to sell her husband liquor after the knowledge was obtained, such knowledge would enhance his guilt. Greater exemplary damages might be given by reason of the guilt thus enhanced.

These propositions rest upon principles that are elementary. Now, the particular point at which we are coming is, that the guilt which constitutes a ground for exemplary damages, and according to the degree of which the exemplary damages should be graduated, must be guilt in causing the actual damages which are recoverable. In this case the guilt must be in causing an injury to the plaintiff's means of support. In one case it is true the defendant was guilty if he caused the plaintiff's husband to use threatening language; but if the threatening language did not cause actual damage, the guilt would not be such as to be a ground for exemplary damages. If it were so, exemplary damages might be given in a case where no actual damages are recoverable. It follows, then, that evidence of threatening language or vulgar conduct, not being such as to cause actual damages, is inadmissible as a ground of exemplary damages. In admitting such evidence we think the court below erred. REVERSED.

#### POWER OF CITIES TO CONTRACT INDEBTEDNESS—LEVY OF TAX.

##### LAW v. THE PEOPLE.

*Supreme Court of Illinois—September Term, 1877.*

[Filed at Ottawa, Feb. 7, 1878.]

HON. JOHN SCHOLFIELD, Chief Justice.

" SIDNEY BREESE,

" T. LYLE DICKEY,

" BENJAMIN R. SHELDON,

" PINCKNEY H. WALKER,

" JOHN M. SCOTT,

" ALFRED M. CRAIG,

Associate Justices.

1. CERTIFICATES OF INDEBTEDNESS—"DEBTS"—CONSTITUTIONAL LIMIT.—Certificates of indebtedness issued by the city of Chicago to procure temporary loans, bearing interest, when issued, negotiated and delivered, are debts within the meaning of the constitution; and the city having before their issue reached the limit created by the constitution to incur more indebtedness, the levy of a tax or an appropriation to pay interest thereon is illegal and void. When the constitutional limit has been reached, and a corpora-

tion then issues bonds, certificates or other instruments drawing interest, and are in form evidences of indebtedness in addition to the limited amount, the court will presume they are prohibited; and if such instruments may, under any circumstances, be lawfully issued, it must devolve on the corporation to establish the fact.

2. CERTIFICATES OF INDEBTEDNESS to procure temporary loans are not an anticipation of the revenue already levied, under the law as laid down in *City of Springfield v. Edwards*, 5 Cent. L. J. 447.

3. THE CITY OF CHICAGO has not the power, under her charter, to provide a fund, by the levy of a tax, to entertain official visitors to the city.

ERROR to Cook county.

WALKER, J. delivered the opinion of the court.

It appears that the bonded indebtedness of the city of Chicago has at all times, since the adoption of our present constitution, been more than five per cent. on the assessed value of the taxable property in the city, as ascertained for state and county taxation. And it further appears that, notwithstanding such bonded indebtedness, the city has, each year since 1872, if not before that time, issued certificates of indebtedness for temporary loans, bearing interest, intended to be paid out of the revenue levied for the current year, and upon which money was loaned to and used by the city to meet the expenses of its government. On the 10th day of August, 1875, the city, by ordinance, levied in detail various sums to meet the expenses of the different departments of the city government, amounting in the aggregate to \$5,123,905.-29, reciting that it was the total amount of appropriations previously made for the purpose, in accordance with the law. It appears that amongst the items thus appropriated and levied, there are a number for interest on temporary loans; one is for payment of interest on the general bonded (municipal) debt of the city, and on temporary loans in addition to the unexpended balance, April 1st, 1875, and to amounts for interest, \$3,000. Another for entertaining official visitors, \$2,000. For interest on temporary loans for this (water) fund \$40,000. For interest on temporary loans for fire department, \$25,000. For interest on temporary loans (police department) \$25,000.

These amounts were respectively levied in pursuance to an ordinance which had been adopted on the 30th of June, 1875, making the several appropriations for the purposes named. It appears that there were outstanding on the 1st day of April, 1875, certificates for temporary loans issued after the constitution went into effect, and before that \$3,000,000, or more. That on the 31st day of December, 1875, the certificates for temporary loans and then outstanding amounted to \$4,500.- And the evidence shows the item of \$3,000,000. 000 appropriated and levied as before stated was for interest on the bonded debt and on temporary loans then outstanding, and for the former the sum of \$251,310, and the remainder to meet interest on temporary loans.

It is insisted that all of the first item levied for interest on temporary loans is void and that all of the other items above specified were levied without

any authority, that the city had not only no power, but is expressly prohibited by the constitution and its charter from making these loans, as the city was at that time indebted beyond the constitutional limit when the debts were incurred to pay the interest for which the levy was made; that the debt being illegal and void, the city had no power to levy a tax to pay interest on a void debt, and the tax cannot be enforced. The constitutional provision supposed to be violated is the 1st clause of the 12th Section of Art. 9. and is this: "No county, city, township, school district or other municipal corporation, shall be allowed to become indebted in any manner or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes, previous to the incurring of such indebtedness." The language of this clause is clear, explicit and emphatic, that no city shall become indebted in any manner, or for any purpose, beyond the limited amount. The city of Chicago was indebted beyond the limited amount when these certificates were issued, and if they in any manner, or for any purpose, create an additional indebtedness, they are clearly prohibited. The language prohibiting indebtedness beyond the limit is so plain as to admit of no doubt, and forbids all construction, and the provision must be enforced as it is written. Where the intention of the framers of the constitution is ascertained, it must, as all will concede, be held paramount to all other powers in the state. It embodies the sovereign power of the state, by virtue of which and which alone, all legislative, executive and judicial power is exercised. It is the source to which all of the departments of government and all its officers must ultimately look to authorize or sustain their official acts as they are found. It has also been repeatedly held, and is regarded as a settled doctrine, that all negative or prohibitory clauses of this character, found in the fundamental law, execute themselves, as legislative provisions in the same or other terms prohibiting the incurring such indebtedness could be no more binding or forcible than the constitution itself. The General Assembly might add a sanction to the provision by imposing penalties and forfeitures on those who should violate its provisions, but that would lend no force to the prohibition; such statutory enactment might prevent its violation, but nothing more. Did these certificates, issued to procure temporary loans in any manner, or for any purpose, create an indebtedness? When issued, negotiated and delivered, did they become debts? That they were seems to be so plain a proposition that we are at a loss to know how to discuss it, or render it more manifest, than by a mere statement of the proposition. We apprehend that these certificates, stating that the city owes the holder the sum named, and promising or directing their treasurer to pay it at a time named, are debts, according to the definition of any English lexicographer, and we apprehend that among the people no one, according to the general understanding of the word, would say

they were not evidence of indebtedness by the city. Nor could the framers of the organic law have intended to use the term in the sense that the sum must be due to be an indebtedness, as that would have created no limitation whatever, as such debts are seldom if ever due when they are created. To so hold would abrogate this provision, and wholly defeat the intention of the framers of that section and of the people in adopting it. It would render the effort to limit city and municipal indebtedness futile, and defeat the supreme will of the state thus clearly and deliberately expressed. But it is said that it will, to so hold, work great hardships and injustice in the holders of these certificates of indebtedness. The same may be frequently said of any other person who violates the law, or does acts contrary to its provisions. The person loaning this money did it in the face of this constitutional provision, and the fifth clause of the 62d section of the chapter entitled "Cities, Villages and Towns," R. S., 1874, p. 218, which expressly prohibits such indebtedness. Such municipal bodies can only exercise such powers as are conferred upon them by their charter, and all persons dealing with them are supposed to see that they have power to perform the proposed act. Such corporations are created for governmental and not for commercial purposes. And hence no power to borrow money is incident to the performance of the duties their charters impose, and it is by grant of power only they can create debts, and no one has the right to presume the existence of such powers, and persons proposing to loan money to a city should see there is such power.

And if the holders of these certificates omitted to do so, when they loaned their money, it was their own fault. The constitutional and statutory prohibition from increasing such indebtedness is so plain that we can not suppose that men of ordinary business intelligence could, had they read it, have failed to see that such indebtedness was unequivocally prohibited when the limit should be reached, and they could, before parting with their money, have easily learned that it had been passed for years. But even if it should work a hardship to individuals, that can not form the slightest reason for violating a clear provision of the constitution, and for wholly perverting its language from its meaning to afford relief. Nor is there any force in the consideration that it will occasion inconvenience to the city officials in conforming to the requirements. They can only exercise the powers granted by their charter and regulated by ordinance. Neither the city nor its officials have any inherent powers in governing the city. It is all delegated and limited by the charter and ordinances adopted to carry such delegated powers into effect. And the question with us and the city authorities is not what would be the most suitable powers to be conferred, but what have been conferred. The people through their representatives are the sole judges of what power shall be granted, what withheld and what prohibited from being exercised, and that when legally expressed must be obeyed by courts and municipalities most

certainly in its full spirit and meaning. The constitution and charter must be enforced, although it may occasion inconvenience in conforming to their requirements. These certificates, then, being evidence of debts, and the city having before their issue reached the limit created by the constitution and its charter, to incur more indebtedness there was no power to levy a tax or make an appropriation for its payment. And the debt having been made and certificates issued in the direct violation of law, they were void, and being so they could draw no interest; and if they did, it would be equally void with the principal, and the levy of a tax, or an appropriation for the payment of the interest is as effectually prohibited as to incur or pay the principal debt. The interest is as much a debt as the sum borrowed, and is no more lawful or binding. It then follows the appropriation and levy of this tax to pay interest on these temporary loans were void and can have no legal effect. But it is claimed that this is but anticipating the revenue already levied and to be collected, and these loans are therefore not indebtedness. They purport to bind the city for their payment, and have all the forms of an indebtedness. And if, from any cause, they should not be discharged from the tax then levied, the lender would, if not prohibited by law, expect and claim that he be paid by the city from some other source. When the attempt was made to create these debts, we must suppose the city officials expected to pay the money, notwithstanding the prohibition of the constitution and the charter; and the lender, if he knew, as he is supposed to have known, of the prohibition, expected to receive payment.

This is not an anticipation of the revenue provided. It is more than that. It is indebtedness to be paid from such revenue, if collected, and if not, then from other revenue. The manner of anticipating revenue already levied, was before us and fully considered in the case of *The City of Springfield v. Edwards*, 84 Ill. 626, 5 Cent. L. J. 447, and on the able arguments filed in this case, we see no reason to change the rule there announced. The questions are essentially the same in the two cases, and that must govern this, in this as well as other constitutional questions. The court below therefore erred in rendering judgment for the tax levied to meet the interest on these temporary loans. We have not been referred to, nor have we found any other provision of the constitution which has in the slightest degree limited or qualified the first clause, unless it be the last clause of the section which authorizes these bodies to issue bonds in compliance with any vote of the people, had before the adoption of the constitution in pursuance of law providing therefor. In the consideration of this question, we have, as the rules of interpretation require, given the language its plain, common, well-ascertained and well-known meaning. We have no authority to give it any other. Nor are these temporary loans sanctioned by the case of *Springfield v. Edwards*, *supra*, as here these certificates of indebtedness are held as claims against the city, and the city is levying taxes to pay the interest on them. And the debt of this

city is shown to have been increased by these certificates to the extent of \$1,500,000 from the 1st of April till the 31st of December, 1875. In *Springfield v. Edwards*, *supra*, it was held that after the tax was levied, the city might anticipate it by drawing against it, if the person performing labor or furnishing articles to the city would receive the warrant in discharge of all liability on the part of the city, and look alone to the officials and not to the city for payment: that a city could not thus make a debt and call it anticipating the taxes already levied; that the warrant thus issued must be received in full for the labor performed or articles furnished, and if not paid the city incurred no liability; that it was at the risk of the person receiving the warrant. Whilst in the case at bar the city is endeavoring to recognize and pay at least interest on certificates thus issued—thus endeavoring to create indebtedness beyond the limit prescribed. The liability to pay interest on such warrants is not a discharge of the city, and looking alone to the officers, but it is looking to the city at least for its payment. When the conditional limit has been reached, and a corporation then issues bonds, certificates or other instruments drawing interest, and are in form evidence of indebtedness in addition to the limited amount, we must presume they are prohibited and void, and if such instruments may, under any circumstances, be lawfully issued, it must devolve on the corporation to establish the fact. In this case, the proof shows that the limit has been reached before these certificates of indebtedness were issued, and the city has shown nothing to overcome the presumption that they are unauthorized and void.

The other question presented by the record is, whether the city has the power to provide a fund by the levy of a tax to entertain official visitors who might come to the city. There is no claim that it is expressly authorized by the charter under which the city is now acting. But it is claimed that the amendatory act of the former charter, approved March 9th, 1867 (1 Vol. Pri. Laws, 771) confers the power, and that as that provision is not inconsistent with the present charter, by force of the sixth section of the charter, the power may be exercised. That section provides that all laws and parts of laws not inconsistent with the general law shall continue in force, and be applicable to any city or village adopting the general law, the same as though the change of organization had not taken place. Is then, that provision inconsistent with the provisions of the charter? The sixty-second section of the general law, has, in the most ample and specific manner, defined the powers of the city. It is so full and definite that there would seem to be no room to doubt that the General Assembly intended such bodies to exercise no other powers than those granted by that section. Whilst the general law does not in terms prohibit the exercise of the powers it does in spirit. When that section says such organizations "shall have the following powers," it by strong implication prohibits or denies the exercise of other powers. When the city was authorized to exercise the powers, and perform the duties imposed by the

sixty-second section of the charter, it by implication conferred the powers to levy and collect revenue necessary to carry out these powers. And the 111th section of the act provides that the city council may assess and collect taxes for corporate purposes, in the following manner: "The council \* \* \* shall on or before the second Tuesday in September (August), in each year, ascertain the total amount of appropriations for all corporate purposes, legally made and to be collected from the tax levy of that fiscal year, and by ordinance levy and assess such amount so ascertained upon the real and personal property within the city \* \* \* subject to taxation, as the same is assessed for state and county purposes for the current year."

This section authorizes the levy of tax for corporate purpose and legally appropriated. In what manner shall we ascertain whether the tax is for a corporate purpose? Manifestly, by turning to that portion of the charter which confers the power to perform duties and exercise powers. If the tax is necessary to carry out any of these powers, or to perform any of these duties, then it is for a corporate purpose. If the appropriation is to enable the city to discharge any of these duties, or to exercise any of these powers, then it is legally made. If the appropriation is made, or tax levied for some other or different purpose, then the appropriation is illegal, and there is no power to levy such a tax. The levy of a tax to raise a fund to entertain official visitors, is not one of the powers granted by the sixty-second section of the charter, and as its exercise is repugnant to the express powers granted, the section of the old charter under consideration can not be held to be a part of the present charter. Municipal corporations can only exercise such powers as are conferred upon them by the General Assembly; and the grant of power must be express, or from implication from the necessity for its exercise to carry out some power that has been expressly granted. The power contended for is not, nor is its exercise, essential to carry out any other power. We are of the opinion that this section, in spirit, conflicts with the provisions of the present charter.

It is urged that the ordinance making the appropriations for the various purposes for the fiscal year is void, because in its title is used the word "common" instead of the word "city," as prescribed by the present charter. When this ordinance was adopted there had been no election held after the adoption of the present charter, and the councilmen under the old charter were still performing the duties devolved on the legislative department of the city government; and it may be that body was still the common council until new aldermen should be elected. And if so, then the title was strictly accurate. But, be this as it may, the two terms are so nearly precisely the same in meaning, that we regard it immaterial which term was used in such an ordinance. Even if the word "city" should technically have been used, the adoption of the language "common council" would not be ground for reversing this judgment. The other questions presented by this

record have been discussed by my brother Scott, and I refrain from their discussion. As to all but the city taxes, we perceive no error in the judgment; and as to them the judgment is affirmed. But for the errors indicated as to the city taxes, the judgment is reversed and the cause remanded, that the court below may render judgment for the correct amount of the city taxes, after deducting the portion illegally levied as above indicated.

SCOTT, J., filed a separate concurring opinion.

Judgment affirmed in part and reversed in part.

#### WILLFUL ACTS OF SERVANTS.

It is a common statement among lawyers that a master is not liable for the willful acts of his servant. This is error. It arose from too broad an application of a doctrine of Lord Holt, in *Middleton v. Fowler*, 1 Salk. 282, that "no master is chargeable for the acts of his servant, but when he acts in the execution of the authority given him, and the act of the servant is the act of the master," and it was held that the master was not liable for damages caused by the negligence of the servant, as no one could now doubt the master's liability. Yet this dictum of Lord Holt was unnecessarily mentioned in *McManus v. Crickett*, 1 East, 106, which merely decides that the action against the master was wrong in form, (nothing more being necessary than a statement of the law of pleading). The report of this case of *McManus v. Crickett* fails to show what was the fact, viz.: that the servant had a personal spite against the plaintiff, and gratified it by a malicious assault. See *Sleath v. Wilson*, 6 C. & P. 607, *Wilde*, *arguendo*. The report is misleading, because it does not show this fact, which induced Lord Kenyon to go beyond the necessities of the case and say *obiter*: "Now where a servant quits sight of the object for which he was employed, and without having in view his master's orders, pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and, according to the doctrine of Lord Holt, his master will not be answerable for such acts." This unnecessary language of Lord Kenyon, in a case where the report does not clearly show a previous personal spite, and used on the wrong assumption that he could justly apply Lord Holt's exploded doctrine of refusing judgment for damages caused by a servant's mere negligence, is the cause of the continued confusion on this question which has so long existed in England and America, making the eminent jurists of the New York Court of Appeals declare that it is not easy to reconcile all the cases. See *Rounds v. The Del. Lack. & West. R. R. Co.*, 64 N. Y. 138. In this case, Judge Andrews cites *McManus v. Crickett* with great caution, withholds his approval, and in a singularly exact opinion states that the master is held justly responsible when the servant, through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances and the occasion, goes beyond the true line of his duty, and inflicts an unjustifiable injury upon another; and the

master is not exempt from responsibility, simply because the servant acts willfully. In *Shea v. The Sixth Ave. R. R. Co.*, 62 N. Y. 180, 186, it is held that the use of the word *willful* can not be considered as charging that the act was *malicious*, and demurrer was overruled. It is held in England that *McManus v. Crickett* is no authority that an action would not lie against the master under the circumstances which existed in that case. *The Druid*, 1 Wm. Rob. 405; *Seymour v. Greenwood*, 7 H. & N. 354; *Limpus v. The London General Omnibus Co.*, 1 H. & C. 526; *Joel v. Morrison*, 6 C. & P. 501; *Mitchell v. Cressweller*, 13 C. B. 237; *Petersdorff on Mast.* & S. 189; *Rex v. Dixon*, 4 Camp. 124; *Weyland v. Elkins*, *Holt's Nisi Prius*, 287; *Sothorn v. How*, Cro. I., 471. The case is repudiated in *Shearman & Redfield on Negligence*, sec. 66; by Judge Reeve in his work on the Domestic Relations, p. 517, and by Redfield in a note at p. 507 of the first volume of his *Treatise on Railways*.

The Supreme Courts of Massachusetts, in *Howe v. Mewmarch*, 12 Allen 49; of South Carolina, *Redding v. J. C. R. R. Co.*, 16 Amer. Rep. 681; of Wisconsin, *Railway v. Finney*, 10 Wis. 338; and *Croker v. The Ch. & N. W. R. R. Co.*, 17 Amer. Rep. 504; and of Maine, in *Goddard v. Grand Trunk R. R. Co.*, 10 Am. Law Reg. N. S. 24, have all denounced the doctrine which *McManus v. Crickett* seems from the meagre report to create, viz: that the master is not liable if his servant's act is willful. The same dissent is found in Kentucky and Indiana. See *Shirley v. Billings*, 8 Bush. 147; *Hawkins v. Riley*, 17 B. Mon. 101; *Jeffersonville R. R. Co. v. Rodgers*, 38 Ind. 416.

There is a growing disposition in the courts and legislatures to enlarge the master's liability. It seems to be good law that the master is liable for the willful misuse of any instrument placed in the servant's hands. See *Phil. & Read. R. R. Co. v. Derby* 14 How. U. S. 468; *Sleath v. Wilson*, 6 C. & P., 607; *Toledo, Wabash & Western R. R. Co. v. Harmon*, 47 Ill. 298; *Sharrod v. London & N. W. R. R. Co.* 4 Ex. 508; *Duggins v. Watson*, 4 Ark. 127. The true rule, as far as any general one may be made, would seem to be that the master is liable in damages for every act of the servant, unless the servant steps aside from his line of duty and commits a wanton, malicious act outside of his employment.

When Dean Swift made Gulliver describe the state of England to his pure master in the far-away Island of the Houyhnhnms, he declared that it is a maxim among lawyers that whatever hath been done before may be legally done again, and that they therefore take special pains to record all the decisions against common justice, and the general reason of mankind. These, under the name of precedents, they have taken great care to multiply and to produce as authorities to justify the most iniquitous opinions, and the judges never fail of directing accordingly. *McManus v. Crickett* proves that this satire of the great English cynic is not wholly undeserved.

New York, March 15th, 1878.

L. B.

## DIGEST OF DECISIONS OF SUPREME COURT OF THE UNITED STATES.

October Term, 1877.

"DUE PROCESS OF LAW."—An assessment of the real estate of plaintiff in error in the city of New Orleans for draining the swamps of that city was resisted in the state courts and is brought here by writ of error, on the ground that the proceeding deprives the owner of his property without due process of law. 1. The origin and history of this provision of the Constitution considered, as found in Magna Charta and in the fifth and fourteenth amendments of the Constitution of the United States. 2. The difficulty and the danger of attempting an authoritative definition of what it is for a state to deprive a person of life, liberty, or property without due process of law within the meaning of the fourteenth amendment suggested, and the better mode held to be to arrive at a sound definition by the annunciation of the principles which govern each case as it arises. 3. It has already been decided in this court that due process of law does not require that the assertion of the rights of the public against the individual, or the imposition of burdens upon his property for the public use, should in all cases be done by a resort to the courts of justice. *Murray v. Hoboken Co.*, 18 How., and *McMilan v. Anderson*, 5 Cent. L. J. 445. 4. In the present case we hold that when such a burden or the fixing of a tax or assessment is by the statute of the state required to be submitted to a court of justice before it becomes effectual, with notice to the owners and the right on their part to appear and contest the assessment, this is due process of law within the meaning of the Constitution. 7. Neither the corporate agency by which the work is done, the excessive price allowed for the work by statute, nor the relative importance of the work to the value of the land assessed, nor the fact that the assessment is made before the work is done, nor that the assessment is unequal as regards the benefits conferred, nor that personal judgments are rendered for the amount assessed, are matters in which the Federal Constitution controls the state authorities. *Davidson v. Board of Administrators of New Orleans*. In error to the Supreme Court of Louisiana. Opinion by Mr. Justice MILLER. Judgment affirmed.

## JURISDICTION—SERVICE OF PROCESS—NON-RESIDENTS—PUBLICATION—FEDERAL COURT—JUDGMENTS OF STATE COURTS—"DUE PROCESS OF LAW."

—1. A personal judgment rendered in a state court in an action upon a money demand against a non-resident of the state, without personal service of process upon him within the state, or his appearance in the action, upon service by publication, is without any validity; and no title to property passes by a sale under an execution issued upon such a judgment. 2. The state having within its territory property of non-residents may hold and appropriate it to satisfy the claims of its citizens against them, and its tribunals may inquire into their obligations to the extent necessary to control the distribution of the property. If non-residents have no property in the state, there is nothing upon which the tribunals can adjudicate. 3. Substituted service by publication, or in any other authorized form, is sufficient to inform parties of the object of proceedings taken, where property is once brought under the control of the court by seizure or some equivalent act. The law assumes that property is always in the possession of its owner, in person or by agent, and proceeds upon the theory that its seizure will inform him that it is taken into custody by the court, and that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale. But where the entire object of the action is to determine the personal rights and obligations

of the defendants, that is, where the suit is merely in *personam*, constructive service in this form upon a non-resident is ineffectual for any purpose. 4. Process from the tribunals of one state can not run into another state and summon parties there domiciled to leave its territory and respond to proceedings against them; and publication of process or notice within the state in which the tribunal sits can not create any greater obligation upon the non-resident to appear. Process sent to him out of the state, and process published within it, are equally unavailing in proceedings to establish his personal liability. 5. Except in cases affecting the personal status of the plaintiff, and cases in which that mode of service may be considered to have been assented to in advance, the substituted service of process by publication, allowed by the law of Oregon and by similar laws of other states, where actions are brought against non-residents, is effectual only where, in connection with process against the person for commencing the action, property in the state is brought under the control of the court and subjected to its disposition by process adapted for that purpose, or where the judgment is sought as a means of reaching such property or affecting some interest therein; in other words, where the action is in the nature of a proceeding *in rem*. 6. Whilst the courts of the United States are not foreign tribunals in their relations to the state courts, they are tribunals of a different sovereignty, exercising a distinct and independent jurisdiction, and are bound to give to the judgments of the state courts only the same faith and credit which the courts of another state are bound to give to them. 7. The term "due process of law," when applied to judicial proceedings, means a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution to pass upon the subject-matter of the suit, and if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the state, or his voluntary appearance. *Pennoyer v. Neff*. In error to the Circuit Court of the United States for the District of Oregon. Opinion by Mr. Justice FIELD. Judgment affirmed.

#### ABSTRACT OF DECISIONS OF SUPREME COURT OF MISSOURI.

October Term, 1877.

HON. T. A. SHERWOOD, Chief Justice.

" WM. B. NAPTON,  
" WAWICK HOUGH,  
" E. H. NORTON,  
" JOHN W. HENRY, } Associate Justices.

**LAND TITLES—EQUITY—FORGED DEED.**—A party who seeks to set aside a conveyance purporting to have been made by himself, on the ground that it is a forgery, must establish the alleged forgery by clear preponderance of testimony. A party not in possession is not entitled to seek relief on such a ground in equity at all. If he is out of possession, he has a full remedy at law. 1 Sto. Eq. Jur., § 711, 11th ed.; *Orten v. Smith*, 18 How. 263; *Polk v. Pendleton*, 31 Md. 118, and cas. cit. Opinion by SHERWOOD, C. J.—*Keane v. Kyne*.

**NEGOTIABLE PAPER—NOTE PAYABLE IN GOODS.**—A note for money "one year after date," "payable in merchandise to be taken during the year," is not payable in money after the expiration of the year, although the goods were not taken, if the maker continued in business at his customary place of business, and had "merchandise" more than sufficient to pay the note,

at all times since the date of the obligation, subject to the payee's demand therefor. By the terms of the note no obligation is devolved upon the maker of the note, and the payee is the actor who must "take." 1 Par. Con., §§ 536, 535. Opinion by SHERWOOD, C. J.—*Lahey v. Chadwick*.

**MANDAMUS—JUDICIAL DISCRETION.**—Under secs. 23, 24, 25, 2 Wag. Stat., p. 1222, the payment of damages assessed under section 25, is optional with the petitioners for the road, and the question whether the road is "of sufficient public utility to justify the payment of the damages," "either out of the county treasury, or out of the road and canal fund," rests in the judicial discretion of the county court; and this discretion is beyond mandatory control. Where the court has previously ordered that the petitioners should pay for the road, and the applicant for the mandamus had moved in the county court for judgment on the verdict for damages, which motion was refused, no mandamus lies. Opinion by SHERWOOD, C. J.—*Strahan v. County Court of Audrain county*.

**SCHOOL MORTGAGES—EQUITY—LACHES AND ESTOPPEL—PRACTICE.**—Where a motion for a new trial is not incorporated in the bill of exceptions, (although contained in the transcript), this court will not consider it. *Pacific R. R. v. Opel*; *Collins v. Bording*, not yet reported. The plaintiff seeks to redeem his land sold under "a school mortgage," and bought by Saline county. The debt was due in 1860. The sheriff sold by order of the county court in 1864, and the county bought the land. In 1869 the agent of the county sold to defendant, Van Meter. This suit was brought in 1873. After Van Meter had completed his payments for the land, and had made valuable improvements, and after plaintiff had, in various ways, recognized the title vested in the county and in Van Meter, and after the decision of the court in *Ray Co. v. Bortley*, 49 Mo. 236, deciding that counties could not become purchasers at such sales—the plaintiff can not enforce his right to redeem, but is barred by estoppel and by his laches. 62 Mo. 573; 63 Mo. 48; *Collins v. Rodgers* 63 Mo. 515; 64 Mo. 576; 45 Mo. 273; 59 Mo. 422; 12 Mo. 333. Opinion by SHERWOOD, C. J.—*Stevenson v. Saline Co.*

#### ABSTRACT OF DECISIONS OF SUPREME COURT OF INDIANA.

November Term, 1877.

HON. HORACE P. BIDDLE, Chief Justice.

" WILLIAM E. NIBLACK,  
" JAMES L. WORDEN,  
" GEORGE V. HOWE,  
" SAMUEL E. PERKINS, } Associate Justices.

**PROMISSORY NOTE—SURETY—EXTENDING TIME OF PAYMENT.**—A verbal promise made by the payee of a note to a surety, that he will proceed at once to collect the note from the principal, is not a waiver by the payee of his statutory right to a notice in writing from the surety. Giving time for a definite period on a note drawing interest, upon a promise to continue to pay the same rate of interest, is not such an extension as will release the surety. Opinion by PERKINS, J.—*Chrisman v. Tuttle et al.*

**PROMISSORY NOTE—LIABILITY OF GUARANTORS.**—1. The contract of the maker and guarantors of a note are separate and distinct contracts, and do not constitute a joint cause of action. 2. The contract of guaranty is assignable and passes to the assignee of the note. 3. A delay of fifty-one days in giving notice to the guarantors of the non-payment of the note by the maker, did not discharge the guarantors, it not being shown that they were injured by the delay. Opinion by PERKINS, J.—*Cole et al. v. The Merchants' Bank*.

**INFANTS LIABLE FOR ASSAULT AND BATTERY.**—An

infant is liable for his torts, and where he has committed a tort with force, he is liable at any age. In this case some boys were throwing chips and pieces of mortar at each other in play, and the Haffner boy was struck in the eye and the eye destroyed. An action for damages resulted in a verdict for \$1,000. *Held*, that though the boy did not intend to inflict the injury, he did intend to do the wrongful act from which the injury resulted, and the fact that the deed was done in sport, having been intentionally done, will not relieve the perpetrator from liability. 53 Ind. 531. Opinion by PERKINS, J.—*Peterson v. Hefner*.

**PROMISSORY NOTE—DISCHARGE OF INDORSER.**—A made his note payable to B, who indorsed the same to C, from whom it passed to D. C having been compelled to pay the note, owing to the insolvency of the maker, brought suit against B on his indorsement. B answered that before the maturity of the note, A, having failed in business, turned over all his property to his creditors who released him from further liability; that the said agreement of composition was signed by C, and that he had received his pro rata share of said property. *Held*, that by this arrangement the note had been fully discharged by A, the maker, and that such discharge and satisfaction of the note constituted a complete bar to any action thereon against B, the indorser. Opinion by HOWK, J.—*Pontious v. Durlinger*.

#### ABSTRACT OF DECISIONS OF SUPREME COURT OF ILLINOIS.

October Term, 1877.—Filed Feb. 7, 1878.

Hon. JOHN SCHOLFIELD, Chief Justice.

" SIDNEY BRESEE,  
" T. LYLE DICKEY,  
" BENJAMIN R. SHELDON,  
" PICKNEY H. WALKER,  
" JOHN M. SCOTT,  
" ALFRED M. CRAIG,

Chief Justices.

**ASSIGNMENT—CERTIFICATE OF SALE—REDEMPTION.**—Taking an assignment of the certificate of sale of land by a sheriff, although to a party entitled to redeem, is not a redemption of the property under the statute, and any one having a judgment against the debtor whose property was sold may redeem from such sale within the period limited by the statute on complying with its terms. Opinion by SCOTT, J.—*Moore v. Hopkins*.

**USAGE—CUSTOM—BINDING ON PRINCIPAL.**—A person who deals in a particular market, must be taken to deal according to the known, general and uniform custom or usage of that market; and he who employs another to act for him at a particular place or market, must be taken as intending that that the business to be done will be done according to the usage and custom of that place or market, whether the principal, in fact, knew of the usage or custom or not. Opinion by SHELDON, J.—*Bailey v. Bensley*.

**CONSTRUCTION OF STATUTE—CREATION OF NEW COUNTIES.**—Under the statute, Art. 3, sec. 1, R. S., 1874, p. 1069, passed March 4, 1874, providing for the creation of new townships by County Boards, and declaring that the size of the same shall not be less than seventeen square miles, where a petition was presented, on the 9th of Sept. 1873, to the County Board of Ogle county for the creation of the new township of Jefferson, but no action was taken on the petition until the 13th day of July, 1874, it was *held*, 1st. that the Board were bound to act in conformity with the statute passed March 4, 1874, not with the old law in force when the petition was presented. 2d. Where the township of Jefferson was created from a part of the territory of the old township of Flagg, and the latter then had less than seventeen square miles, it was *held*, that both townships were new as contemplated by the statute, and one of them not having seventeen square

miles, the act by which the separation took place is void. Opinion by SCHOLFIELD, C. J.—*Town of Jefferson v. The People*.

**EVIDENCE—OPINION—NEGLIGENCE.**—In an action of damage for an injury, the question of negligence is one of fact for the jury, and it may be inferred from the attending circumstances. It is error therefore to allow a witness to testify whether in his opinion certain acts were negligent. The opinions of witnesses should not be received as evidence, when all the facts on which the opinions are based can be ascertained and made intelligible to the court or jury. It is only on questions of science, skill or trade, or others of a like nature that such opinions are received. Opinion by WALKER, J.—*Austin v. The Chicago, Rock Island & Pacific R. R.*

#### ABSTRACT OF DECISIONS OF SUPREME COURT OF KANSAS.

January Term, 1878.

Hon. ALBERT H. HORTON, Chief Justice.

" D. M. VALENTINE,  
" D. J. BREWER,

Associate Justices.

**LEASE—RENT PAYABLE IN IMPROVEMENTS—LIEN.**—1. Where a tenant, under a written lease, pays rent in advance for certain real estate by making improvements thereon, and is to occupy the premises until the rent shall equal the cost of the improvements, and fails to take advantage of the statutory enactment relating to liens for mechanics and others, and no express lien is created by the lease, and the tenant is wrongfully evicted by his landlord before the expiration of the time for which the rent has thus been received; *Held*, that the tenant has no lien for the rent so paid in advance on the leased real estate which can be enforced by a foreclosure and sale of the premises. Reversed. All the justices concurring. Opinion by HORTON, C. J.—*Beck v. Birdsall*.

**FEES AND EMOLUMENTS OF OFFICE.**—1. Where H. on November 5th, 1872, was duly elected Register of Deeds of Harvey county, and thereafter qualified and acted as such officer, and C was elected his successor at the general election in November, 1873, but failed to qualify till September 23d, 1874, and there was no canvass of the votes, or declaration of the result of the election of November, 1873, till said September 23d; *Held*, in an action brought by C against H to recover for the fees and emoluments of the office from January 12th, 1874, to September 24th, 1874, that H, the incumbent, had the right to hold the office till C qualified and that C was not entitled to any of the fees or emoluments of the office for the time during which the former held over. Opinion by HORTON, C. J. Reversed. All the justices concurring. — *Hubbard v. Crawford*.

**CASE MADE—PRACTICE.**—1. A case made must be complete and perfect when settled, signed and attested. To be available on review in error in the supreme court, the original case made must be attached to and filed with the petition in error, and it must contain a statement of so much of the proceedings and evidence, or other matters of the district court, as may be necessary to present the errors complained of; and *Held*, that a case cannot be supplemented and perfected in this court by attaching thereto certified copies of the pleadings and other proceedings of the district court neither referred to nor incorporated in the case made; and, also, *Held*, in the absence of the pleadings in an action, or any statement of the issues in controversy, the supreme court cannot determine from an examination of the evidence and instructions preserved in a case made, whether there is any material error in the rulings of the district court in receiving and rejecting

testimony, or in directing the jury. Sec. 547, civil code, Gen. stat. 1868; sec. 1, ch. 185, laws 1877. Opinion by HORTON, C. J. Affirmed. All the justices concurring. —*The Missouri & Kansas Transportation Company v. Palmer.*

#### ABSTRACT OF DECISIONS OF SUPREME COURT OF OHIO.

December Term, 1877.—Filed March 5, 1878.

HON. WILLIAM WHITE, Chief Justice.

" W. J. GILMORE,  
" GEO. W. MCLVAINE,  
" W. W. BOYNTON,  
" JOHN W. OKEY, } Associate Justices.

" CIVIL DAMAGE" LAWS.—Separate actions were brought against different defendants, under the laws of 1870, 67 Ohio Laws, 103, for alleged injuries to a wife's means of support from the intoxication of her husband. The petitions in form were identical. *Held*, the fact that the plaintiff in one case received a sum of money in satisfaction and discharge of her cause of action was no defense in the other case, if, in fact, the intoxications were separate and distinct. Opinion PER CURIAM.—*Miller v. Patterson.*

RES ADJUDICATE—ESTOPPEL.—When an action was prosecuted to set aside a contract on the ground of fraud, and to cancel an unmatured note given in pursuance of the contract, which resulted in a judgment affirming the validity of the contract and note: *Held*, that in a subsequent action on the note, the defendant is estopped, by the judgment in the former action, from setting up that the contract and note were executed by the parties under a mutual mistake. Opinion by MCLVAINE, J.—*Bell v. McCollock.*

#### ABSTRACT OF DECISIONS OF SUPREME COURT COMMISSION OF OHIO.

December Term, 1877.—Filed March 6, 1878.

HON. W. W. JOHNSON, Chief Justice.

" JOSIAH SCOTT,  
" D. T. WRIGHT,  
" LUTHER DAY,  
" T. Q. ASHBURN, } Associate Justices.

DOWER—RELEASE.—1. A release of a wife's inchoate right of dower is a valid consideration for a conveyance of property to her. 2. Such conveyance will not be held fraudulent and void as to the husband's creditors, unless the amount of consideration received is so disproportionate to the value of the wife's contingent dower as to be unreasonable. 3. So great is the difficulty of estimating the worth of contingent dower rights; so uncertain and imaginary are the values which are the necessary elements of the computation, that the court will not pronounce the transaction fraudulent, from the fact that the wife insisted upon and received a sum greater than her dower, if the facts do not show *mala fides* in her or her husband. Judgment affirmed. Opinion by WRIGHT, J.—*Sengree v. Welch.*

PRACTICE—JURORS—INTOXICATION.—1. Where no exception is taken at the trial to the charge of the court to the jury, a judgment will not be reversed, on error, upon the mere ground of error in the charge, without reference to the merits of the whole case. 2. Where, however, the whole evidence is made part of the record, and it appears that the contract is contrary to law, the overruling of a motion for a new trial on that ground, may be reviewed on error, though no exception was taken to the ruling of the court. 3. The mere fact that a juror in a civil case drank intoxicating liquors during an adjournment of the court while the trial was in progress, is not a sufficient reason for granting a new trial, unless there be reason to suspect

it may have had some influence on the final results of the case. 4. Any attempt on the part of the prevailing party or attorney in the case to corrupt a juror, though it be not shown to be successful, is a good ground for a new trial. 4. Where it appears that during the progress of a trial, the prevailing party or his attorney has furnished intoxicating liquors to a juror, it is a good ground for a new trial, unless it is clearly shown that it was not intended to influence his action in the case, and that it had no influence on his mind as a juror. Judgment affirmed. Opinion by DAY, J.—*Pitts., Cin. & St. L. R. R. v. Porter.*

INSURANCE—STATUTE REGULATING FOREIGN COMPANIES.—1. The twenty-first section of "an act for the incorporation and regulation of life insurance" (S. & S., 222) making it unlawful for any agent to act for a foreign insurance company, in the transaction of its business, without procuring from the auditor of state a certificate of authority, etc., is a regulation imposed for the benefit of policy holders, and others doing business with such company, to be enforced by the penalties provided in said act. 2. Said section imposes a personal duty on the agent of such company, to procure such certificate, and file it with the recorder of the county, and a violation of such duty subjects him to a penalty; but his acts as such agent, within the scope of the authority conferred upon him by the company, are valid and binding, not only in favor of third persons, but as between principal and agent, notwithstanding his failure to procure and file such certificate. 3. In an action against such agent and his sureties on a bond, given for the faithful performance of his duties, to recover money collected by him within the scope of his agency, and which he has failed to account for, his failure to comply with the provisions of said section is no defence in favor of such sureties. Judgment reversed. Opinion by JOHNSON, C. J. Scott, J., did not sit in this case.—*Manhattan Ins. Co. v. Ellis.*

#### ABSTRACT OF DECISIONS OF SUPREME JUDICIAL COURT OF MASSACHUSETTS.

March Term, 1877.

HON. HORACE GRAY, Chief Justice.

" JAMES D. COLT,  
" SETH AMES,  
" MARCUS MORTON,  
" WILLIAM C. ENDICOTT,  
" OTIS P. LORD,  
" AUGUSTUS L. SOULE, } Associate Justices.

NEGLIGENCE—EMPLOYER AND EMPLOYEE—FELLOW SERVANT.—1. To maintain an action against his employer, by one who has sustained injuries by a fall from an imperfect staving, while at work as a mason erecting a wall, the plaintiff must establish some neglect of a duty on the part of defendant, arising out of the relation between them, which was the direct cause of the injury. 2. When, in such case, the defect was an imperfect "putlog," the employer, if he undertook to furnish it, will be liable, if wanting in ordinary care in its selection. But if the defendant employed competent men to take charge of the erection of the building, and of the staving necessary, and furnished suitable material therefor, he would not be liable if a fellow-workman, not under the superintendence of the defendant or his agent, selected a defective putlog, by the breaking of which the plaintiff was injured. Opinion by COLT, J.—*Colton v. Richards.*

EXCEPTIONS—TIME OF FILING AND PRESENTMENT.—A bill of exceptions was examined and allowed, subject to the opinion of this court, upon the question of law arising upon these facts: The time for filing and presentment of these exceptions was extended by the court "to April 12th." Before the said

time expired the exceptions were duly filed with the clerk. The last day of said extended time was the day of the annual fast. The presentment to the court was not made until the day thereafter. *Held*, that the question presented does not depend upon the rules which govern the computation of time, when the last of a certain number of days allowed by statute or by general rule of court happens to fall on Sunday or other legal holiday, but upon the construction of the special orders made by the judge in this case, which did not define the time by the number of days, but by a particular date. The plaintiff, having taken the objection before the allowance of the exceptions, has the right to insist that they were not presented to the judge as well as filed with the clerk within the time limited by the judge's order. Gen. Stats., Ch. 115, § 7; *Doherty v. Lincoln*, 119 Mass. 208; *Conroy v. Callahan*, 120 Mass. 165; *Walker v. Moors*, 122 Mass. Opinion by GRAY, C. J.—*Cooney v. Burt*.

**EASEMENT—EXTINGUISHMENT OF—REMEDY.**—On Dec. 24, 1814, an indenture of two parts was entered into between the defendant and one F by which the defendant granted to F "the right and use of an open dock and passage way for ships, vessels, boats and floats of every description, with free ingress and egress for the same at all times to and from his and their said wharves and estates, etc.," and reciting "that no fixtures or buildings of any kind are to be erected within the bounds above described as said dock, nor any unnecessary obstructions or impediments permitted therein." In 1855 the plaintiff acquired all the title conveyed to F by the indenture, and has owned the same ever since. The common dock, referred to by the indenture, lay between the wharves of the plaintiff and the defendant and was used by both parties, remaining open to the sea until 1869, when the city of Boston, under St. 1867, c. 234, built a street across the dock; and under St. 1869, c. 181, filled up the portion of the dock west of said street. After the filling, the defendant erected permanent wooden buildings upon the parcel in question, interrupting, thereby, the plaintiff's use of the same. *Held*, that the only easement acquired under the indenture, was of an open dock and common passage way for ships and other water craft; that all the covenants, including that against erecting fixtures and buildings of any kind within the bounds of the dock, were incidental to the easement; and that the laying out of the street and the filling up of the dock by the city, made the enjoyment of this easement impossible and thereby extinguished it. *Hancock v. Wentworth*, 5 Met. 446; *Canney v. Andrews*, 123 Mass.; *Mussey v. Union Wharf*, 41 Me. 34; 3 *Toullier Droit Civil* (5th ed.) 522. The plaintiff's remedy for the destruction of the easement was by application for damages against the city under the statute. Opinion by GRAY, C. J.—*Central Wharf Co. v. Prop. India Wharf*.

#### ABSTRACT OF DECISIONS OF THE ST. LOUIS COURT OF APPEALS.

[Filed March 12, 1878.]

HON. EDWARD A. LEWIS, Presiding Justice.

" ROBERT A. BAKEWELL, } Associate Justices.  
" CHAS. S. HAYDEN, }

**NEGLIGENCE—EXCUSABLE CUSTOM.**—1. To support a recovery on the ground of negligence in not complying with an alleged custom in a certain business, it must be shown that the custom was general and well-established, or that defendant had knowledge of it. 2. There can be no recovery for damages occasioned by a pure accident occurring from the breaking of a tool in the hands of an innocent cause of the injury, and being used by him with proper care in the regular discharge of his duty, after taking the ordinary pre-

cautions. 3. It is negligence to leave glass exposed in the lower floor of a building in course of erection, where workmen carrying and using tools are working upon and passing over the unfloored rafters over-head. Reversed and judgment for defendant. Opinion by BAKEWELL, J.—*Boyd v. Graham*.

**LIQUOR LAWS—INDICTMENT—PRACTICE.**—1. A merchant's license does not authorize the sale of liquors in quantities less than a gallon, except in case of a druggist selling them for medicine. Under an indictment for selling in quantities less than a gallon without a dram-shop license, it is not necessary to show that the liquor was drunk on the premises. Error pointed out in reporter's syllabus of *State v. Brosius*, 39 Mo. 534. 2. Where the name of the accused, though appearing in the information, has been omitted in one sentence through neglect to fill a blank left for it in the form, the proper amendment may be made at any time during the trial, on such terms as to delay as shall work no injustice to the accused. If the accused can not safely proceed after an amendment, he must show cause by affidavit, and must apply for delay. Affirmed. Opinion by BAKEWELL, J.—*State v. Krull*.

**MARRIED WOMAN'S DEED—CERTIFICATE OF ACKNOWLEDGMENT—EXECUTION—PRACTICE—IRREGULARITIES.**—1. The certificate of acknowledgment of a deed by a married woman, conveying her own property, which says that she was made acquainted with the contents of the deed by the officer, and that, separate and apart from her husband, she acknowledged the same to be her act and deed, without any undue influence of her said —, states what is a substantial compliance with the law in these particulars, and, though informal, is sufficient. The word "husband" being omitted where no other word will supply the blank, will not make the acknowledgment bad. The policy of the law is to indulge the presumption that the officer did accurately what he imperfectly certified to; and courts will not disturb titles by minute criticism of the certificates of justices of the peace, where substantial compliance with the law is sufficiently set forth. 2. It is irregular to issue execution from the circuit clerk's office on a justice's transcript which shows that the execution was returned before the day. But a sale under such an execution is not null, and can not be collaterally attacked. 3. Where the defendant in an execution is correctly named in the body of the writ as *Forly Loftus*, and afterwards mentioned in the mandatory part of the writ as the "said Henry Loftus," the error is immaterial, as the identity of person is apparent. 4. Where a deed bears a date subsequent to its acknowledgement, the date of acknowledgment may be taken to be the date of the deed. 5. Where a grant is for the benefit of the grantee, and the deed is made with his knowledge, and at his request, the delivery for record by the grantor will be taken to be a delivery to the grantee. Affirmed. Opinion by BAKEWELL, J.—*Gorman v. Stanton*.

**WILLS—UNDUE INFLUENCE—EVIDENCE.**—1. The question of will or no will is one for the jury, under directions of the court. Where a will is made in favor of a religious institution by a patient dying within its walls, the instrument being written by one acting as chaplain of the hospital, who is appointed executor, where the mind of the alleged testator is even slightly obscured by disease, fear of approaching death, opiates or otherwise, though, in the absence of proof of actual fraud, such a will is not void, it is looked upon with suspicion, and is very difficult to establish if attacked. And if, in addition to the fact that a controlling influence is shown to have been in a position to exert itself, the will is not in accordance with the law of descents, and passes over, without apparent reason, a natural heir for a stranger, and misdescribes the nearest relatives of the testator, a verdict against the will can not be set

aside as being against the evidence. Slight circumstances in such a case may furnish a sufficient legal warrant for an inference against the will, which the jury may draw if it choose, and which, if drawn, is fatal to the instrument. 2. In a case of a contested will, previous declarations of the testator in a will executed three years before are competent, as tending to show the intentions of the testator at that time. 3. A witness, on cross-examination, may be compelled to answer any question which tends to shake his credit by injuring his character, however disgraceful the answer may be to himself, except where it exposes him to a criminal prosecution. The extent of such cross-examination is in the discretion of the court. Affirmed. Opinion by BAKEWELL, J.—*Mueller v. St. Louis Hospital Association*.

## BOOK NOTICES.

**BOOKS RECEIVED.**—Sawyer's United States Circuit Court Reports, Vol. IV. A. L. Bancroft & Co., San Francisco; Nevada Reports, (Hawley), Vol. XII. A. L. Bancroft & Co., San Francisco; Bump's Notes on Constitutional Decisions. Baker, Voorhis & Co., New York; Moak's Digest of English Reports. Wm. Gould & Son, Albany; Jones on Mortgages, 2 vols. Houghton, Osgood & Co., Boston.

\*Publishers will confer a favor by marking the price of their books on the wrapper.

**LEGAL MAXIMS, with Observations and Cases. Part I. One Hundred Maxims, with Observations and References to American Cases. Part II. Eight Hundred Maxims, with Translations. By GEORGE FREDERICK WHARTON, of the English Bar.** To which is added in this edition, Part III, several hundred Maxims, with References to English Cases. New York: Baker, Voorhis & Co. 1878.

We wish to give two sentences from the publishers' preface, and then to ask a couple of questions. "The publishers know of no book which gives so large a number (*i. e.*, of maxims)," and "Mr. Wharton's work which, perhaps, is the most popular of its kind." Is it not true that Bouvier's Law Dictionary, (Philadelphia, 1870), under the title *Maxims*, gives no less than 1882 maxims, or nearly twice as many as does the work before us? Is not this a reprint of an obscure collection printed in England about thirteen years ago, which never obtained any reputation or circulation in particular, and which was completely superseded by the treatises of Mr. Broom and Mr. Wayne? We are assured that this is so, and that, consequently, there is a slight discrepancy between the preface and the facts.

This collection, however, will be useful. The Maxims in Part I are discussed and explained, and the cases in which they are referred to are cited. The second part contains the maxims and translations simply, but why the one hundred maxims in Part I have been repeated among the eight hundred in Part II it is difficult to say. Mr. Wharton's collection has been supplemented by the addition in Part III of several hundred maxims, taken from Abbot's New York Digest, which have been applied or commented on by the court of last resort, or other courts of general jurisdiction in the state of New York. Under the head of Maxims of Jurisprudence will also be found another valuable collection taken from the civil code prepared for the latter state by the commissioners of 1857-1865, but not acted upon by the legislature. The book contains in all three hundred and fifty-two pages, and is neat in appearance and handy for reference.

**SUPPLEMENT TO THE OHIO DIGEST**—containing all the Supreme Court and Supreme Court Commission Cases in Vols. 25, 26, 27, 28 and 29 Ohio State Reports, and Subsequent Decisions to January 29, 1878. By CLEMENT BATES, of the Cincinnati Bar. Cincinnati: Robert Clarke & Co.

Although not more than three years have elapsed

since the appearance of Walker & Bates' Digest of the Ohio and Ohio State Reports, this supplement to it will, we are confident, be gladly welcomed by the profession. Since that time the reports have appeared with double the usual frequency, owing to the existence of the Supreme Court Commission, in addition to the regular Supreme Court, so that there is abundant necessity for the present publication. The cases digested number something over six hundred, and include not only all of those reported in the published volumes from volume twenty-five to twenty-nine inclusive, but also all of those which will make up volume thirty, and about one-third each of those which will constitute volumes 31 and 32. This brings the decisions down to the first of February, 1878.

The cases that will appear in the yet unpublished volumes, 30, 31 and 32, are taken from the newspaper reports which print the syllabi of cases decided by the Supreme Court and Commission, as they are filed. These reports are, however, not less trustworthy than if taken from the published volumes, for by a rule of the Supreme Court of Ohio, in force since 1858, it is required that "a syllabus of the points decided by the court in each case, shall be stated in writing by the judge assigned to deliver the opinion of the court, which shall be confined to the points of law, arising from the facts of the case, that have been determined by the court. And the syllabus shall be submitted to the judges concurring therein for revision before publication thereof; and it shall be inserted in the book of reports without alteration, unless by consent of the judges concurring therein." The inferior courts have uniformly interpreted this rule to mean, that the syllabus of a decision declares all that the case actually decides, and is controlling upon them, attributing to it a more binding force than to the opinion *in extenso*. Recognizing this fact, Mr. Bates has been able to give us a digest which includes all the decisions made up to within six weeks of the date of its publication. The same plan of arrangement, than which no better could be suggested, and the same fullness and accuracy which, in Walker & Bates' Digest, gave the profession in Ohio a digest excelled by none in any other state, are found in this supplement. Mr. Bates deserves the thanks of the profession for what he has done.

The printing, paper and binding of the book are such as to make it a pleasure to look at and handle. W.

We have received from P. W. Ziegler & Co., Philadelphia, the initial volume of the "Handy Law Series," issued by this firm. It is a pocket edition of the Law of Copyright, by Hugh M. Spalding, author of "Spalding's Treatise," etc. It is printed in small type, is of 150 pages, and contains the different sections of the United States Copyright Law, with all the adjudications under it, and constant references to the larger works on the subject. The necessary forms for obtaining a copyright and for proceeding for its infringement are given, and the little work will certainly find its way to the libraries of all interested in the subject—A Table of Cases in the Reports of the State of Connecticut, which have been cited, explained, limited, doubted or overruled in subsequent decisions: By George Sharswood, Jr., has been issued by T. & J. W. Johnson & Co., Philadelphia. In 200 pages the compiler gives, in alphabetical order, the results of his examination of over seven thousand cases in the reports of his state. The object of an undertaking like this is "to enable the practitioner whenever he meets with a decision to trace it through subsequent cases, and thus ascertain its authority—how far it has been relied on, qualified, explained, questioned and denied." Such works are always valuable to the profession.

### QUERIES AND ANSWERS.

[In response to many requests from lawyers in all parts of the country, we have decided to commence again the publication of questions of law sent to us by subscribers. We propose to make this essentially a subscriber's department—i. e., we shall depend, to a large extent, upon them to edit this column. Queries will be numbered consecutively during the year, and correspondents are requested to bear this in mind when sending answers.]

#### QUERIES.

12. **PARTNERSHIP—DISSOLUTION—COVENANT TO "ACCOUNT."**—Upon a dissolution of a partnership, one partner sells his interest to the other, and having been the sole manager, covenants to "account" to his late co-partner for all property belonging to the late firm which had come to his hands during his management of the business. Does the promise to account imply a promise to pay or make good to the purchasing partner any deficiency that a true account between the managing partner and the late firm may show to exist? H.

13. **A TRAINS HIS DOGS TO STEAL MEAT** and bring it home. These dogs, let out at night by A, carry off meat from B's counter and bring it home. Is A indictable for larceny? \*

Cambridge, Mass.

14. **A ESTABLISHES SEVERAL HIVES OF BEES** in the garret of his house in a city. A knows that these bees will feed themselves by depredations on the neighboring groceries. It turns out that they do; and the open cases of sugar in several adjacent groceries are covered by the bees, whom no ingenuity or care can repel. They infest the shops and crowd the shelves, devouring everything sweet which they can seize. They return to A's house laden with their spoils, and A reaps from this a valuable crop of honey. Is A indictable for the larceny of the sugar? \*

Cambridge, Mass.

#### ANSWERS.

##### No. 3.

(6 Cent. L. J., 159.)

I fail to see the parallelism of the case referred to (12 Ind. 241) in Mr. W. H. Bainbridge's answer in 6 Cent. L. J., 220, to question No. 3. I believe it to be a well settled principle of law, that the order of a court, if void for any reason, as for want of jurisdiction, etc., affords no protection to persons or officers acting under, by virtue of or with reference to said order, and are therefore just as liable as if said order had not existed; exactly the case referred to by W. H. B. But would it not have assumed a different phase had the person been indicted, convicted and sentenced under and by virtue of a law afterward declared unconstitutional, and the party had been confined in the state prison, and had labored for the commonwealth instead of laboring for a private person who may have leased said prison or paid for said labor for the purpose of speculation or any other purpose? Suppose that had been the case in 12 Ind., 241, against whom would he have brought suit for labor? Could he have sued the state of Indiana? We think not. He would have been dependent upon the mercies of the legislature; and even then I look forward to the possible declaration of the unconstitutionality of an act to relieve, for such acts would engender endless applications for relief by those who might fancy themselves aggrieved upon like grounds. F. M.

Urbana, O.

##### No. 6.

(6 Cent. L. J., 179.)

The remedy of the debtor is by injunction, to restrain the plaintiff from further prosecution of the suit in Indiana. The assignee should not be entitled to any greater right than the assignor had, and so far as

the question relates to the original parties, it has been decided in the case of Snook, et al. v. Snetzer, 25 Ohio St. 516. In May 1876, Mr. Abraham Epstein, a merchant of Aurora, Indiana, went to Cincinnati and before a justice brought suit to recover a debt owed him by Jas. Farrin, an employee of the Ohio & Mississippi Railroad at Cochran, same county and State. A writ of garnishment was served on the O. & M. R. R., whereupon Mr. Farrin brought suit in the circuit court in Lawrenceburg to enjoin Epstein from further prosecuting his case in Cincinnati, his grounds being that both parties to the suit were residents of Dearborn county, Ind., and the O. & M. R. R. was located in that county as well as in Ohio, so that Dearborn county was the proper place to bring the suit. Furthermore, not being a resident of Ohio, he had no benefit of the Ohio exemption law, and the suit being taken out of the place of his domicile deprived him of the benefit of the Indiana exemption laws as well. On these grounds alone Judge Roberts sustained the injunction. See also: Engle v. Scheurman, 40 Ga., 206; Dehon v. Foster, 4 Allen, 545; 7 lb., 57; Vail v. Knapp, 49 Barb., 299.

A court of equity will interfere in a proper case to prevent the prosecution of a suit in a foreign court when it has jurisdiction of the parties, even after suit has been commenced in the foreign court—and to secure to an individual the benefit of the laws of the state in which he resides. High on Injunctions, sec. 60; Great Falls v. Werster, 23 N. H., 470; Bank, etc. v. Rutland, 28 Vt., 470; Hays v. Word, 4 John, Chy., 123; 2 Story's Equity, sec. 900. "Where by the law of the domicile of the payee of a chose in action, and where the same is made, or made payable, either in express terms or by construction of law, the same is not attachable by process of foreign attachment." Story on Conflict of Laws, sec. 400. The law of Ohio should govern. WM. STONE ALBERT.

Washington D. C.

### TREASURE-TROVE.

DURING the trial of a case where Rufus Choate had borne patiently an unfriendly interruption and bitter taunt, some one who was near asked him why he endured such treatment and why he did not retort. "I shall retort," he said, "by getting the case." And he got it.

LORD THURLOW, who was as sententious and caustic as in debate, in discoursing of the difficulty he had in appointing to the Chief Justiceship, described himself as long hesitating between the intemperance of Kenyon and the corruption of Buller, but finally preferring the former. Then, as if afraid lest he had for a moment been betrayed into anything like unqualified commendation of any person, he added, correcting himself, "Not that there was not a damned deal of corruption in Kenyon's intemperance."

In the last century the Temple Gardens were a famous and favorite resort for promenading. Dr. Dibden says, "Toward evening it was the fashion for the leading counsel to promenade during the summer months in the Temple Gardens. Cocked hats and ruffles, with satin small-clothes and silk stockings, at this time constituted the usual evening dress. Lord Erskine, though a great deal shorter than his brethren, somehow always seemed to take the lead, both in place and in discourse, and shouts of laughter would frequently follow his dicta."

WRITING of Brougham, Charles Sumner says: "I do not remember to have met a person who swore half so much." He "abused Miss Martineau most heart-

ily," and said she was "a great ass" on questions of policy and government. He recommended Sumner to write a book to avenge his country of Basil Hall. He told Sumner that O'Connell was "a damned thief." When Sumner took leave of him, he exclaimed, "Oh, God! must you go?" The late Duke of Gloucester, he said, was "a damned bore and a fool." On one occasion Sumner found him in his study with a printer's devil on one side and his private secretary on the other, and "*mirabile dictu!* he did not use an oath."

MR. BISHOP's statement in his new work on Contracts, § 404, that "a consideration in the law of contracts must be a thing, in some sense, of pecuniary value," is strongly combatted by one of our contributors, who says: "If I promise a man \$10.00 in consideration of his not eating any dinner to-day, Mr. Bishop must admit that this a valid obligation on me. If the man does not eat any dinner I am bound to pay him the \$10.00, and the consideration for my promise is his abstaining. But is 'not eating a dinner,' 'capable of being reduced to a money value?' The truth is that money value has nothing to do with the consideration, which is always the doing, or promising to do, something not illegal, at the request of the promisee, which you are not already under a legal obligation to him to do. Why, if a man, at my request, burns my best coat on my promise to pay him \$5 for so doing, I must pay him if he does it, and not only have I received nothing capable of being reduced to a money value, but have lost my best coat, and hence have lost something capable of being reduced to a money value, though, perhaps, not a very great one."

IN the case of *Adair v. Swinburne*, says Twiss, in his *Life of Lord Eldon*, an issue had been directed out of the Court of Exchequer, to be tried at Durham, upon a question of very great importance to coal owners. Lord Eldon had been counsel in the proceedings in the Exchequer, and was chosen by the other counsel to lead the cause; there was a special jury of gentlemen of the county well acquainted with the subject of collieries. The cause was tried before Justice Buller, and when Lord Eldon rose to reply, Justice Buller said: "Mr. Scott, you are not going to waste the time of the court and the jury in replying? You have not a leg to stand on." Scott said, "My Lord, in ninety-nine cases out of an hundred I would sit down upon hearing the judge so express himself; but so persuaded am I that I have the right on my side, that I must entreat your Lordship to allow me to reply; and I must also express my expectation of gaining the verdict." The verdict was in his favor, and Buller afterwards sent for him, told him he had come to the conclusion that he, Buller, was entirely wrong, and expressed regret for having tried to stop the argument. Eldon says, "This cause raised me aloft."

IN a private note to this journal, Mr. M. M. Bigelow, the author of "The Law of Estoppel," "The Law of Fraud," etc., says, among other things: "By the way, in an interesting and candid review of my book on 'Fraud,' the critic has fallen into a very curious delusion. He imagines (*Southern Law Review*, March, p. 927) that, in my division of the law of fraud, I have laid down the doctrine that fraud in law is presumptive fraud, a law which he shows that I have elsewhere contradicted. Such a proposition, though in a limited sense it might be true, would be highly absurd, and deserves the condemnation which the critic gives it. But how he could put such a statement into my mouth in the face of the very language which he quotes from my book, is odd. He quotes me correctly, in support of his criticisms, as saying that 'presumptive fraud is fraud in law,' not that fraud in law is presumptive

fraud—a very different thing. The critic nowhere doubts that presumptive fraud is fraud by inference of law, and he would be a bold man who should doubt that. Fraud in law, however, is often actual fraud, involving turpitude, as the critic observes; and it is so treated in many parts of my book."

## NOTES.

*The Nation* says that one of the clauses in the new chapter of the Code of the State of New York, recently vetoed by the Governor, which embodies the "Civil Damage Act," enlarges the scope of the law so as to give an action for the breach of a contract caused by the sale of liquor—a principle never heard of before, and impossible to apply in practice.

WHEN, two years ago, in England, a couple of zealots recovered a penalty against an aquarium company, which exhibited fish on Sunday, for violating the act against the opening of places of public entertainments on that day, public opinion was so hostile to the revival of this ancient statute in this way, that Parliament passed an act by which the Crown was empowered to remit the penalties in whole or in part, the common informer notwithstanding. But this latter personage was not disheartened, and so the other day a Mr. Rolfe and a Mr. Girdlestone stepped forward to enforce the penalty "in respect of the Aquarium having been opened of the 15th of August, 1875." Mr. Rolfe recovered judgment first. Mr. Girdlestone, persevering, when met by the defense of "judgment recovered," prayed in aid the "Acte agaynst collusions and fanyed accions," 4 Hen. 7, c. 20. This venerable statute provides that, "if eny persone or persones herefter sue with gode feith eny accion populer, i. e., penal action, and the defendaut in the same accion plede eny manner of recovere of accion populer, in barre of the said accion . . . that thenn the playntyf in eny suche accion taken wyth good feyth, may avarre that the said playntyf was barred in the said accion populer by covyn," and that if the covin be found, the plaintiff shall have judgment. The "covyn" relied upon by Mr. Girdlestone was that Mr. Rolfe's action had been brought at the instance of the defendants against themselves, for the alleged innocent purpose of trying by experiment whether the government would remit the penalty in respect of any and what entertainment of which marine fish formed the principal ingredient. The court held that the covin had been found, and gave judgment for the plaintiff. "Covin," they say, "is a secret assent determined in the minds of two or more to the prejudice of another," which definition is not to be readily found in any of the books.

IN discussing the jury system, the *Solicitors' Journal* considers that whatever is done in the matter—whether we are to go forward or backward—it ought to be enacted that no civil action should be tried by jury as of right. There are, doubtless, some cases of very conflicting evidence, where the knot must be cut rather than untied, and a jury is found a useful implement for that purpose; and there may possibly be some other exceptional cases—some classes of libel cases, for instance—where their aid is desirable for the assessment of unliquidated damages; but, in the vast majority of actions, a jury is simply an expensive nuisance, greatly aggravating the length of a case, without in the least assisting in its determination. If they acquiesce—as they ordinarily do—in the summing up of the judge, the case would have been better, and much sooner, decided in the same way if they had been absent; if they refuse to be guided by him they are probably wrong,

not unfrequently led away upon some point of mere prejudice; and, moreover, the verdict is all but certain to be set aside, unless the judge refuses, though invited, to express his dissatisfaction. The saving of judicial time which would be effected by withdrawing all these cases from juries altogether would be enormous, if we take into account the fact that, under that system, the present absurd and cumbrous machinery of "new trials" would all but disappear. The case once heard and decided would, if the judgment were appealed from, be at once heard and decided again; and a successful appeal could be given effect to by a reversal of the judgment, not as now, by sending the parties back to renew the farce of setting before a jury a mass of evidence which they must deal with in a prescribed manner, under the penalty of having their verdict in turn set aside, and the dreary round begun again.

THE Arlington estate case, *Lee v. Kaufman*, which, both from the historical interest of the property in dispute, its great value and the important question of law which arose at the outset, is one of more than ordinary interest and notoriety, was advanced a stage on the 15th inst. by the decision of Hughes, J., in the Circuit Court of the United States for the Eastern District of Virginia. The late G. W. Parke Custis, the owner in fee of eleven hundred acres of land, situated on the Potomac River, in Alexandria County, Virginia, and known as the Arlington estate, dying, in 1857, devised it to his only child, Mrs. Mary A. R. Lee, the wife of General Robert E. Lee, for life, and at her death to pass in remainder to her eldest grandson, G. W. Custis Lee, the plaintiff in this case, in fee. During the civil war this estate, with the Arlington mansion, was unoccupied by its owner, Mrs. Lee, who was then living; and the title did not pass to her son until 1873, the date of her death. On the 5th of August, 1861, the United States Congress passed "an act to provide increased revenue from imports to pay interest on the public debt, and for other purposes." On the 7th of June, 1862, it passed "an act for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes." And on the 6th of February, 1863, it enacted still another law entitled "an act to amend an act entitled an act for the collection of direct taxes," etc. The first named law imposed a direct annual tax upon the United States of \$20,000,000; and apportioned to Virginia the sum of \$937,552; on which tax the assessment upon Arlington was \$92.07. On the 11th of January, 1864, the whole estate of eleven hundred acres was sold for the payment of this tax by the tax commissioners of the United States for Virginia. The price bid by the government was \$26,800. It was bought in by the tax commissioners, under authority of that clause of the act of congress of February 6th, 1863, which empowered the government at such a sale as this was, to purchase the lands which might be selected by the President "for government use—for war, military, naval, revenue, charitable, educational or police purposes." The United States at once took possession of the estate, and has held it ever since; no part of the purchase money which would have remained after deducting the tax, having ever been paid over either to the life tenant or the remainderman. The estate is now occupied by Kaufman, and about two hundred other persons. Against all these by name as defendants, the plaintiff, in April last, brought actions of ejectment. The defendants pleaded the general issue under the statute. The United States by Attorney-General Devens intervened, and upon suggesting upon the record that the United States was the owner of the property, moved to dismiss the suit on the ground that the court had no jurisdiction. The

plaintiff demurred, and upon the suggestion and demurrer, after lengthy arguments, Judge Hughes delivered an elaborate opinion, which we have just received, and which covers forty-three pages of a printed pamphlet.

The questions of law considered by the court were two: 1st, Whether the attorney-general's suggestion was of itself sufficient to defeat the jurisdiction of the court over the cause; and, 2d, Whether, supposing it has not that effect, the court may look into the grounds on which that officer intervenes and enquire into the strength of the government's title. The first question the court decided in the negative, and the latter in the affirmative; thus sustaining the plaintiff's demurrer. The court rested its decision upon four cases—*Meigs v. McClung*, *Wilcox v. Jackson*, *Grisar v. McDowell*, and *Cooley v. O'Conner*—all decided by the Supreme Court of the United States. The first of these in point of time, is that of *Meigs, et al. v. McClung's lessee*, 9 Cranch 11. The land in dispute was occupied by the United States as a military garrison. An action of ejectment was brought and the process was served on Meigs, the military officer of the United States in command at the garrison. The cause proceeded to judgment in the federal court below; and went up on writ of error to the Supreme Court of the United States. The cause was there heard, and Chief Justice Marshall delivered the unanimous opinion of the court, holding that the plaintiff might sustain the action. The question of jurisdiction does not seem, so far as the report shows, to have been raised. *Wilcox v. Jackson*, 13 Pet. 498, was also ejectment to recover Fort Dearborn at Chicago, a possession of the government occupied by its army officers for the purpose of a military station. The action was brought in a state court and was proceeded in there to a judgment. 1 Scammon (Ill.) 344. It was taken by writ of error to the Supreme Court of the United States; and that court heard the cause and proceeded to judgment upon it. In that case the decision of the state court against the government was reversed, and a judgment for the government given, by the Supreme Court. The judgment in each forum was upon the merits, and not upon the question of jurisdiction. The state court took jurisdiction upon the merits; and the Supreme Court reversed the state court upon the merits; taking no notice of the question of jurisdiction. In *Grisar v. McDowell*, 6 Wall. 263, the plaintiff claimed as seized in fee the presidio of the old pueblo of San Francisco, then occupied by the United States, and brought his action indirectly against the United States, who set up that the property was public property of the United States, reserved for military purposes. The defendant named was General McDowell, commanding the military post, and process was served on him. The circuit court entertained jurisdiction of the cause, and proceeded in it to judgment. It was thence carried to the Supreme Court of the United States, which proceeded in it to judgment. The report does not show that in either court the question of jurisdiction was expressly raised. *Cooley v. O'Conner*, 12 Wallace, 391, is the latest case. The action was ejectment. It was brought to recover a lot of ground in the town of Beaufort, South Carolina, owned by the United States. Process or notice of ejectment was served on the occupants, who were tenants of the United States. It was a case in which the United States was sued indirectly, in ejectment, for property claimed by the government. The claim, as in the case now at bar, was founded on a tax title obtained at a sale made *durante bello*, by direct tax commissioners of the United States, for delinquent taxes. The circuit court assumed jurisdiction of the cause, and the Supreme Court affirmed its judgment. The court considered itself bound by these authorities, both on account of their source and their applicability to the case before it.